Supreme Court, U.S.
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No. 01-656

IN THE
Supreme Court of the United States
OCTOBER TERM, 2001

A.D. BEDELL WHOLESALE COMPANY, INC., TRIANGLE CANDY & TOBACCO CO., on behalf of themselves and all others similarly situated,
Petitioners,

-against-

PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, INC., BROWN AND WILLIAMSON TOBACCO CORP.,
Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE FORCES ACTION PROJECT, LLC, FREEDOM OF CHOICE, INC., CONSUMERS, LLC, SMOKERS OF THE WORLD UNITE, HAWAII SMOKERS' RIGHTS and NYC CITIZENS LOBBYING AGAINST SMOKER HARASSMENT, IN SUPPORT OF THE PETITION FOR CERTIORARI

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COME NOW FORCES Action Project, LLC, Freedom of Choice, Inc., Consumers, LLC, Smokers of the World Unite, Hawaii Smokers' Rights, and NYC Citizens Lobbying Against Smoker Harassment and support Petitioners' request that this Court review and reverse the holding in *Bedell* extending application of the *Noerr-Pennington* doctrine to non-speech, post-petitioning, anti-competitive conduct and failing to properly apply the principles of *Parker* v. *Brown*, and submit the following brief in support of the petition.

Interest of Amici and Summary of Argument

Amici are grassroots organizations whose membership is composed, primarily, of cigarette consumers concerned with the preservation of adult choice to use and enjoy tobacco products, and who advocate against governmental restrictions on the behavior of citizens on matters of personal choice and lifestyle such as smoking. Amici FORCES Action Project, LLC, and Consumers, LLC, are limited liability companies organized under the laws of the State of California. Freedom of Choice, Inc., is a corporation organized under the laws of the State of Utah. Amici Smokers of the World Unite, Hawaii Smokers' Rights and NYC Citizens Lobby Against Smokers Harassment, are unincorporated voluntary membership associations. The Amici have no affiliation with, and receive no financial support from, tobacco manufacturers.

Petitioners seek review of a ruling by the Third Circuit Court of Appeals affirming the District Court's dismissal of an action filed by Petitioners. That action alleged that the Master Settlement Agreement ("MSA"), which resolved litigation by 46 states against Respondents, illegally gave monopoly pricing power in the cigarette market to Respondent Philip Morris, Inc. *et al.*, and was an explicit price-fix and output-restriction in violation of the

antitrust laws of the United States. Petitioners sought to recoup monies they have been and will be required to pay under the MSA. The explicit, almost-exclusive purpose and effect of the MSA was to allow Big Tobacco to pass through to, and to collect from, consumers the $206 billion cost of the MSA, without facing a severe price disadvantage vis á vis competitors, and to turn money over to the states. In the process, Big Tobacco could add on more and keep it for themselves, and did so.

If the Attorneys General of the 46 states who filed the actions sought to accomplish lofty goals by their suits, in the end they failed. The suits and the MSA became, solely, a vehicle for the cash-hungry states to raise billions from a very large minority of their citizens (without the due process of, *e.g.*, a duly enacted tax measure) and a vehicle for absolving Big Tobacco of the obligation to pay the huge stipulated judgments to which it consented. Indeed, the States not only relieved Big Tobacco from the liabilities they sought to impose on them by the suits, they rewarded them by, they believed, giving them monopoly pricing power. These facts cannot be ignored, passed over, and not given their due legal effect by the fact that the MSA is "one of the most significant civil settlements in the nation's history." (*FORCES Action Project, et al.* v. *State of California, et al.*, U.S.D.C., N.D. Ca. No. 3:99-CV-00607, Order Granting Motion to Dismiss and Denying Leave To File Second Amended Complaint, 1/5/00, PACER Dckt. No. 81.) That fact simply illustrates the enormity of the wrong done by the States and Big Tobacco to their customers, citizens and taxpayers.

While Petitioners are the direct purchasers of the products of Respondents Philip Morris, Inc., *et al.*, the price increases were passed on to Amici, the indirect, but ultimate purchasers of Respondents' products. As consumers, Amici's members are the primary beneficiaries of

the antitrust laws of the United States. No persons, including Petitioners and Respondents, were more deeply and centrally affected by the MSA than were Amici.

In addition to their economic interests, Amici, as consumers and citizens, have a keen desire to restore the important consumer-protection principles of *Parker* v. *Brown*[1] that the Third Circuit removed in the present case. While the Third Circuit in *Bedell* clearly, and correctly, held, that the parties to the MSA had not secured *Parker* immunity for the price-fix and output restriction mandated by the MSA, it held, nonetheless, that the MSA, and the price increases mandated and carried out pursuant to it, were immune under the *Noerr-Pennington* doctrine.[2] Prior to *Bedell*, application of *Noerr-Pennington* had been restricted to concerted speech ("petitioning") that sought exemptions from the antitrust laws for contemplated, substantive anticompetitive conduct. *Noerr-Pennington* held that Free Speech principles trumped antitrust principles and that such speech was protected. Prior to *Bedell*, only one court had held that the free-speech principles enunciated in *Noerr* and *Pennington* could immunize substantive anticompetitive activity that constituted a *per se* violation of the Sherman Act. From a time-line perspective, *Noerr-Pennington* (on appropriate facts) gave immunity for joint anticompetitive conduct leading up to governmental action, but whether immunity was achieved for the substantive activity thereafter was determined by *Parker* v. *Brown* principles.

The Third Circuit displaced *Parker* v. *Brown*

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[1] 317 U.S. 341 (1943).

[2] *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

as the law governing post-settlement activities and replaced it with *Noerr-Pennington*. The Third Circuit failed to understand the relationship between *Noerr-Pennington* and *Parker* and extended *Noerr-Pennington* to activity that does not invoke First Amendment considerations. Nothing in the prior opinions of this Court suggests such a result and such a result flies in the face of the reasoning of this Court in *Noerr, Pennington, Parker* and their progeny.

Parker v. *Brown* ensures that where the States propose to remove competition as the dominant force in pricing goods and services, that decision shall be made only by the State, acting as the sovereign representative of all of its citizens, and not by individual public officials acting without explicit, *pre-existing* mandate from the State. *Parker* also ensures that when the States, acting in a sovereign capacity, determine to allow a monopoly or oligopoly, they shall closely regulate and supervise pricing by the monopoly or oligopoly. While the Third Circuit recognized *Parker* principles and correctly applied them in *Bedell* (holding that Respondents had not secured *Parker* immunity) it also found them largely irrelevant when it, nonetheless, extended *Noerr-Penningon* into post-settlement activity.

If post-settlement, non-speech activity is at issue, there are no predicate facts to invoke First Amendment and *Noerr-Pennington* principles. And if *Noerr-Pennington* is applied to post-settlement, non-speech activity, *Parker* v. *Brown* is robbed of any meaning and consumer protection has been eroded very significantly. The Attorneys General will have succeeded in gaining authority for activities previously within the sole province of the legislature and regulatory agencies. Unlike the legislature and the regulatory agencies, the Attorneys General are not suited, let alone authorized, to perform the close supervision and regulation that a grant of monopoly pricing power requires.

Some of the Amici are plaintiffs in an action

pending in the United States District Court for the Northern District of California (*FORCES Action Project, supra*). In August, 2001, the United States Circuit Court of Appeals for the Ninth Circuit reversed an order of the District Court denying Amici leave to amend their complaint to state a claim under the antitrust laws for injunctive relief. Amici have now renewed their motion for leave to file a Second Amended Complaint. A ruling by this Court on the validity of the ruling by the Third Circuit will impact Amici's pending case, and others pending in other courts throughout the country.

Finally, Amici suggest that the absence in the MSA of any provisions regarding, either, the manner and amount of the price increases mandated by the MSA, or any restrictions on the uses of the monies paid by tobacco consumers to the States (through Respondents), has resulted in having tobacco consumers bear an unconscionably disproportionate share of the costs of general public improvements, benefits and expenditures which are financed by the $206 billion tobacco consumers will pay. Tobacco consumers did not participate in the negotiations over the MSA directly nor were they represented indirectly by the States acting as sovereign. The monies which the MSA mandated be paid by consumers are being used to pay for a broad array of general public benefits, improvements and expenditures and are, truly, the extraction of a tax without representation.

In summary, Amici and the millions of tobacco-consuming members of the public whose interests they seek to protect have a tangible, profound interest in the antitrust and constitutional questions presented by the Petition. As the petition shows, the output restrictions embodied in the MSA's so-called Renegade Clause (MSA § IX(i)) have enabled the major cigarette manufacturers (the "Majors") to boost cigarette prices far beyond levels needed

to fund the settlement payments to the States. The supracompetitive price increases already have cost tobacco consumers billions of dollars and the resulting revenues to the States pay for matters of general public benefit whose costs should be shared by all.

Argument

Amici's arguments, summarized above, that the MSA and the conduct carried out pursuant to it were illegal, and the argument that the Third Circuit misapplied *Noerr-Pennington*, are fully supported and discussed in the brief of Petitioners and other amicus briefs filed herein. Those arguments are not repeated here, but are incorporated by reference. Amici present supplemental facts and argument regarding the economic impact upon them of the illegal price-fix and output restriction and regarding other litigation that attacks the MSA, both of which justify review by this Court.

1. Amici Are Adversely Affected by the MSA

The final agreement between the 46 States Attorneys General and the Majors was publicly announced on Friday, November 20, 1998. N.Y. Times, Nov. 21, 1998, A1, col. 5. Industry analysts at that time computed that the costs of the $206 billion settlement, to be paid to the States over 25 years, likely would be passed on to tobacco consumers by means of price hikes totaling 35 to 40 cents a pack. *Id.*

It took only until the following Monday to discover how far off the mark the analysts were, and how blind they were to the supracompetitive pricing scheme put into place by the MSA's output restrictions. On November 23, 1998 — the same day the Majors executed the MSA — Philip Morris and RJR within minutes of each other announced a price increase of 45 cents a pack, which was quickly matched by Lorillard and Brown &Williamson. N.Y. Times, Nov. 24, 1998, A20, col. 1. Thus, by the time the sun went down on the first day of the MSA's legal existence, the Majors already were positioned to begin extracting supracompetitive profits from tobacco consumers.

But this was only the beginning. The Majors raised prices by another 18 cents a pack in August 1999, by

13 cents a pack in January 2000, by 6 cents a pack in July 2000, by 14 cents a pack in December 2000, and by 14 cents a pack in April 2001. The wholesale price of a carton of cigarettes has increased from approximately $19.00 to about $30.00 in less than three years, or more than 60 percent. Petition at 12-13; Joint App. at 680; N.Y. Times, Aug. 31, 1999, C5, col. 4, April 18, 2001, C13, col. 4 & April 26, 2001, C4, col. 1.

The impact of the supracompetitive pricing on tobacco consumers can be measured by comparing the additional revenues generated by these phenomenal price increases and the payments made by the Majors under the MSA. Through April 2001, the net annual payments to the settling States under the MSA totaled approximately $16 billion. In this same period the several price increases generated additional revenues of approximately $29 billion (after 9 percent downward adjustments for normal free market price rises and for market share loss), or almost double what was needed to fund the MSA payments. Little wonder that Philip Morris, the dominant company with over 60% of the premium and 50% of the total market, in its SEC filing for the second quarter 2001 reported record profits for its domestic cigarette company. *See also* Forbes Magazine, "The Giant Tobacco Robbery", Jan. 22, 2001 (available online at www.forbes.com/forbes/2001/0122/062.htmlt); Pet. App. at 14a-16a.

The MSA gives the revenue-hungry States a vested interest in the Majors' maintenance of market share and excessive profits. So long as the Majors are protected against market share erosion, starting in April 2002 the payments to the States for that year and annually thereafter will go from $8 billion eventually peaking at $9 billion. However, as recently reported by the Associated Press on October 21, 2001, "[t]he National Conference of State

Legislatures released a report in August [2001] showing that only 5 percent of the tobacco settlement money was being used on smoking prevention. Some states used the settlement money to make up shortfalls in state budgets and fund programs that had nothing to do with smoking." For example, Tennessee spent $560 million of its MSA money — four years' worth — to balance its current budget. Other states already committed to using hundreds of millions of MSA dollars to balance their budgets include Michigan, Wisconsin, Missouri, Montana and Ohio.

Effectively, this constitutes taxation of tobacco consumers without representation. Smokers were absolutely excluded from participating in the underlying litigation and negotiation of the MSA. In California, for example, the Attorney General of that State successfully opposed an intervention petition by one of the present Amici, to intervene in the action it had filed against Respondents so that consumers would have a voice in and be represented at those proceedings. While the Attorneys General have argued that they brought the underlying actions in the public interest and, thus, that smokers' interests were represented, the public was and is widely divided on tobacco issues and no attorney could adequately represent both sides on tobacco issues. To the extent that the Attorneys General did, in fact represent smokers, they breached their duty to them when they agreed to allow the tobacco companies to shift the costs of the settlement to them (and were unsuccessful in securing *Parker v. Brown* and *Noerr* immunities either for themselves or the tobacco companies).

2. The Existence of Other Litigation Justifies Resolution of Common Issues By This Court

As noted above, some of the Amici are plaintiffs in the above-mentioned *FORCES Action Project* litigation against Respondents and the States (who were not defendants in *Bedell*) in an action alleging that the MSA, and the conduct carried out pursuant to it, are illegal anticompetitive activities. The [Proposed] Second Amended Complaint filed by Amici in that case does not merely complain of the MSA, but, rather, places it in the context of and capstone of a long-standing illegal conspiracy by the Majors to control cigarette pricing. Amici allege that, in entering into the MSA, the States joined the conspiracy and gave the Majors the long-sought monopoly pricing power.

The allegations of the long-standing conspiracy set forth in Amici's pending case also closely track the allegations of the Second Consolidated Amended Class Action Complaint in *In Re Cigarette Antitrust Litigation*, MDL No. 1342, U.S.D.C. N.D. Ga. No. 1:00-cv-447 JOF. While that complaint focuses on the pre-MSA conduct of Respondents, it recites the price increases adopted after the MSA as evidence of the conspiracy and as further acts carried out pursuant to the conspiracy.

In addition to *In Re Cigarette Antitrust Litigation* the MSA was attacked in *PTI, Inc.* v. *Philip Morris, Inc., et al.*, 100 F. Supp. 2d 1179 (2000), and in a pending action in the Western District of Pennsylvania, *Mariana v. Fisher*, Civil Action No. 1:01-CV-2070 (SHR). An additional antitrust challenge to the MSA is pending on appeal from an order of dismissal in a case filed in the District of Columbia by cigarette importers, *North American Trading Co. v. National Association of Attorneys General*, Civil Action No. 01-1600 (PLF). Amici are generally aware

that the MSA has been and is under attack by a variety of public-health interests and competitors in a large number of cases, although Amici do not have information to specifically identify them.

Litigation will continue on a broad scale in the District Courts and Courts of Appeal. The sheer number of cases, as well as the importance of the issues, fully recommend review by this Court at this time to resolve core issues presented in all.

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Respectfully submitted,

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